IN THE COURT OF APPEALS OF IOWA

No. 7-584 / 96-1928

000087

DUBUQUE RACING ASSOCIATION, LTD.,

Plaintiff-Appellant,

vs.

DUBUQUE CASINO BELLE, INC.,

Defendant-Appellee.

FILED
MAR 27 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Plaintiff appeals a district court ruling awarding both parties' damages in plaintiff's action against defendant for breach of contract and breach of good faith. **AFFIRMED.**

Brendan T. Quann and Stephen C. Krumpe of O'Connor & Thomas, P.C., Dubuque, for appellant.

Stephen J. Juergens of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, for appellee.

Heard by Cady, C.J., and Sackett and Streit, JJ.

SACKETT, J.

This appeal concerns claims between plaintiff-appellant Dubuque Racing Association, Ltd., and defendant-appellee Dubuque Casino Belle, Inc., that a contract and modification for distribution of gaming boat revenues were breached. The parties contracted[1] on November 20, 1989, for a three-year contract to end on March 31, 1994.[2] The contract anticipated defendant would operate a gaming boat and plaintiff would receive certain payments, including admission fees and a percent of gaming revenue.

This action was filed following defendant's decision to sell the boat in November 1992[3] before the contract had expired and move it away from Dubuque. Plaintiff sought (1) rescission of a May 1992 amendment that terminated defendant's obligation to pay plaintiff admission fees, and (2) damages for defendant's breach of

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[1] Both plaintiff and defendant were represented by counsel during negotiations and on the signing of the contract.

[2] Legislation enacted in 1989, now known as Iowa Code sections 99F.1, et seq., authorized river boat gaming. Plaintiff was established as a dog racing licensee in 1984. Iowa Code section 99D required its proceeds be distributed to tax-exempt charitable organizations and local government. Defendant was incorporated November 15, 1989, to contract with plaintiff. The stock in defendant was owned by Robert and Ruth Kehl, who had owned and operated excursion boats on the river in the Dubuque area. For defendant to obtain a gaming license and operate a gaming river boat, it was necessary to contract with a non-profit co-licensee.

[3] A purchase agreement signed in August 1992 was finalized in November after plaintiff's first right of refusal expired.

the third year of the contract. Defendant filed a cross-claim seeking damages for plaintiff's failure to make dock improvements.

The trial court ordered judgment against defendant and in favor of plaintiff in the amount of $176,250,[4] and judgment against plaintiff and in favor of defendant in the amount of $167,970.[5] Plaintiff appeals contending the trial court (1) should have rescinded a May 8, 1992 amendment; (2) did not properly compute its damages; (3) incorrectly mitigated its damage award; and (4) should not have awarded defendant sums for dock improvements. We affirm.

Plaintiff first contends the trial court should have rescinded a May 8, 1992 amendment to the contract[6] because of defendant's breach. The original contract[7] called for plaintiff to receive a five dollar per adult passenger admission fee and a

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[4] Damages for defendant's breach were set at $1,000,000 reducing it by $520,000 and $303,750 plaintiff received in mitigation of damages.

[5] $147,970 for the cost of installing the lift, plus $20,000 representing $10,000 for each of the two years it did not have the canopy.

[6] The amendment had been necessary because initially the boat was extremely successful until other Iowa boats entered the market. There were also Native American operations in Iowa, Minnesota, and Wisconsin, and boats in Illinois competing for gambling dollars resulting in a need to amend the agreement and resulting in the May 8, 1992 amendment retroactive to April 1, 1992.

[7] Both parties were new to river boat gambling, contracting under time restraints and intentionally leaving some issues for later determination.

percentage of gambling receipts.[8] The amendment changed the contract in that defendant would no longer pay plaintiff an admission fee for passenger boarding; rather, defendant would pay regulatory fees, a tax of fifty cents per passenger, and advertising and marketing expenses plaintiff paid under the earlier agreement. Additionally, the May 8, 1992 amendment provided defendant would negotiate in good faith from October 1 to December 31, 1992, for a fourth season. In November 1992, defendant sold the boat. Plaintiff contends defendant breached the contract in failing to negotiate in good faith, the breach was substantial, and plaintiff should be awarded $3.81 per passenger as compensation for the admission fee it gave up under the May 8, 1992 amendment for the second season.

There is a disagreement about our scope of review on this issue. Plaintiff sought alternative relief of either damages for the breach or rescission and restitution. Plaintiff contends because rescission is an equitable remedy our review is de novo. Defendant contends because the action was filed and tried at law it is for errors of law. The matter was tried as a law action. We review as a law action. *Trobaugh v. Hy-Vee Food Stores, Inc.*, 392 N.W.2d 154, 156 (Iowa 1986).

The trial court was correct in refusing to rescind the contract. Defendant gave

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[8] Plaintiff would receive twelve and one-half percent of the first $5,000,000 of net gambling receipts and fifteen percent over $5,000,000. There was a minimum payment of $1,000,000 reduced to $500,000 if competing boats entered the market in Illinois or Wisconsin near Dubuque.

concessions to plaintiff and freed plaintiff from the obligation of paying regulatory fees and head taxes, in addition to advertising and promotion costs.

The trial court found troubling aspects about both parties' positions. Both parties point out factors showing the agreement was never without conflict. The trial court found there were discussions from May to August relating to a third and fourth season. There is substantial evidence to support this conclusion. Consequently, the claimed failure to negotiate in good faith which plaintiff contends was the breach was not shown. We affirm on this issue.

Plaintiff next contends the damage award of $1,000,000 for breaching the third year of the contract was not supported by substantial evidence. Plaintiff contends the evidence coupled with the trial court's findings support a higher award.

The contract provided, among other things, defendant would operate a gaming boat in the third year of the contract for the period from April 1, 1993 to March 31, 1994. Defendant did not, but ended operations March 31, 1993, thereby breaching the contract. Consequently, plaintiff is entitled to damages for the breach of that part of the contract. The question on appeal is whether the $1,000,000 damage figure set by the trial court is supported by substantial evidence.

Plaintiff contends the trial court's computation of damages is in error. Defendant claims the damage award is supported by substantial evidence. The trial court found attendance on the gaming boat in year three would equal or exceed the attendance in year two. Plaintiff contends after making the finding the trial court

should have gone forward and found the projected damages to then be determined by multiplying year two attendance by the projected gaming loss of each passenger, with plaintiff's percentage applied to that amount. Plaintiff argues the trial court's ultimate damage award was not consistent with its projected finding of year three attendance figures.

The contract provision plaintiff sought to enforce called for a $5 admission fee per adult passenger to be paid to plaintiff. This was the fee charged in the first year but waived only for year two by the May 8, 1992 amendment.

The trial court found that by April 1, 1993,[9] the terms of the original agreement did not allow for a successful business operation and market conditions had changed. These findings are well supported by evidence of additional competition for gaming dollars. The contract tied defendant's payments to admissions and gambling receipts. The court found the operating conditions of year two more similar to year three. The court noted there were boats on the river that did not charge admission and admissions here would be sensitive if the admission charge were levied, and an admission charge would decrease admissions as well as money wagered. The court then concluded a good faith effort by defendant would have produced less revenue than the second year and, balancing all considerations, plaintiff would have received

[9] Defendant's boat left Dubuque that date. River boat gambling with another boat did not begin until May 18, 1994.

$1,000,000 in net revenue in the third year. Plaintiff's damages for the breach were established at this amount.

Plaintiff contends, in essence, this computation was faulty because the damages it suffered by virtue of the breach can only be computed by multiplying the number of passengers the trial court determined would come on the boat by the projected amount each passenger would lose, less city admission taxes, state gaming taxes, and taking plaintiff's percentage of that amount.

Plaintiff argues the trial court should have considered defendant would not have charged the admission fee and driven down attendance, as this would have decreased its profits also. Rather, plaintiff appears to argue defendant would not have charged the fee but would have paid it out of other monies.

Defendant contends the trial court's findings are supported by substantial evidence and should be affirmed.

This issue was tried at law. The trial court's findings of facts have the effect of a special jury verdict and are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). In case of doubt or ambiguity, we construe the findings to uphold rather than defeat the trial court's judgment. *PEB Practice Sales, Inc. v. Wright*, 473 N.W.2d 624, 626 (Iowa App. 1991). Findings of a trial court are given a liberal construction favorable to the judgment. *Bahnsen v. Rabe*, 276 N.W.2d 413, 414 (Iowa 1979).

Plaintiff has the burden of establishing the amount of its loss. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 688 (Iowa 1990). If there is a reasonable basis in the record for inferring or approximating damages, recovery is allowed. *Id.* Damages are allowed in such amount as a reasonable person would expect to follow the breach. *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994).

The trial court observed that the contract was "unworkable in the sense of permitting a successful business operation . . . [and] the appropriateness of determining damages on the basis of an outdated agreement is troubling." The trial court then went on in a detailed analysis concerning probable attendance in the third year of the contract had defendant not breached its contract. This analysis included an acknowledgment that nothing in the contract required defendant to charge an admission fee of the passengers nor was there any provision making the admission fee to be paid to plaintiff contingent on defendant charging passengers an admission fee. The court concluded in its analysis that some fee would have been charged and "even the best balance would have resulted in significantly lower admissions in year three." The court went on to state, "Balancing all considerations the DRA would have received one million dollars in net revenue from the DCB in year three." This analysis did not add an additional term or condition to the contract, but merely considered all the probable facts and circumstances that affected likely revenue in the third year.

Plaintiff asks that we find there is no reasonable basis in the record for this award. Where a damage award bears no reasonable relationship to loss suffered, the verdict cannot stand. *See Kerndt v. Rolling Hills Nat'l Bank*, 558 N.W.2d 410, 417 (Iowa 1997). Plaintiff contends the only method to determine damage is by multiplying attendance by the gaming loss for each passenger in attendance.

We disagree with plaintiff that the trial court was required to compute damages using this method. There was substantial evidence from both sides concerning the expansion of the gaming industry during this three-year period. This expansion would decrease the available gaming dollars to be wagered. There is substantial evidence the charging of the admission fee would severely curtail attendance. There was evidence defendant showed a loss for income tax purposes of $49,305 for calendar year 1992. There is substantial evidence supporting the damage award made by the trial court.

The trial court reduced the damages for breach in the third year by $823,750 plaintiff received from the new gaming boat operation. This sum represented a minimal guarantee of $500,000, plus interest on non-refundable fees of $20,000,[10] and liquidated damages of $303,750 for the boat's failure to operate from April 1, 1993 to March 31, 1994.

Plaintiff contends its damages should not be reduced by the $303,750 because

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[10] The trial court found the parties agreed the $500,000 and $20,000 should mitigate plaintiff's damages.

it elected to pay this amount to the City and County of Dubuque, and consequently it was an expense, not revenue. The trial court found this payment voluntary and not required and refused to entertain plaintiff's contention its damages should not be mitigated in that amount.

There was no evidence these payments were required. The trial court's finding on this issue is supported by substantial evidence.

Plaintiff's last contention is that the trial court should not have awarded defendant damages for plaintiff's failure to build a canopy and hydraulic lift.

The canopy was never installed. The trial court found this failure damaged defendant $10,000 per year, totaling $20,000 for the two-year operation. The lift was necessary for operations and was installed at defendant's expense of $147,970. Plaintiff agrees it was obligated to construct improvements in Ice Harbor, but advances it never agreed to provide the canopy or the lift.

The question is whether there is substantial evidence supporting these findings. There is evidence the plan for the harbor improvements presented to the Gaming and Racing Commission showed both a canopy and a lift. The original agreement obligated plaintiff to acquire the docking site and make the improvements. Plaintiff contracted with the City of Dubuque for the improvements. The trial court found the fact plaintiff contracted with the City for the improvements did not relieve plaintiff from living up to its contract. These findings are supported by substantial evidence.

AFFIRMED.